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No. 96-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SYLVESTER ABRAMS,

Petitioner,

v.

PAUL BARNETT, Warden,
Danville Correctional Center,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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11 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether certiorari should be allowed due to the Antiterrorism and Effective Death Penalty Act of 1996 and *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), No. 96-6298?

2. Whether the State trial court violated petitioner's Sixth Amendment right to effective assistance of counsel when the court allowed petitioner and his counsel to confer during the noon recess?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court's denial of the petition for writ of habeas corpus is reported as *Abrams v. Barnett*, 100 F.3d 485 (7th Cir. 1996). A copy of that opinion is appended to the petition for writ of certiorari as Appendix A (A-1 to A-17).

JURISDICTION

Petitioner's statement of jurisdiction is complete and correct.

CONSTITUTIONAL PROVISIONS

Petitioner's statement of constitutional provisions is complete and correct.

STATEMENT OF THE CASE

Petitioner's statement of the case does not set forth sufficient facts relevant to the questions presented. Respondent sets forth additional facts relevant to this Court's consideration of the questions presented for certiorari review.

Petitioner's questions presented labeled 1(A) though 1(C) concern the Antiterrorism and Effective Death Penalty Act and *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996). In *Lindh*, the Seventh Circuit held the Act's limitations regarding when a writ may issue were retro-

active to pending cases on the date the Act was signed. *Lindh*, 96 F.3d at 865. On April 14, 1997, this Court, having previously granted a writ of certiorari in *Lindh v. Murphy*, Sup. Ct. No. 96-6298, heard oral arguments regarding the Act's retroactivity to cases pending when the Act was signed.

Petitioner's second question presented addresses whether the state trial court denied petitioner effective assistance of counsel when it denied counsel's request to confer with petitioner in private during a noon-hour recess on the final day of trial. When the recess occurred, three witness remained to be called, only one of whom was a state witness. Pet. App. at 32.[1] After the State rested, petitioner testified, followed by a detective who clarified where petitioner was arrested. Pet. App. at 32. The trial court gave petitioner an opportunity to consult with counsel at counsel table. Pet. App. at 35. Counsel refused the offer, citing the vicinity of the deputy sheriff, the prosecutors, and the court. Pet. App. at 32. Discussion at the counsel's table would have been free of any taint that had affected discussions through the speaking hole in the holding cell. Pet. App. at 35-36. Petitioner was afforded an opportunity to consult with counsel, and counsel rejected it. Pet. App. at 36.

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[1] Respondent will cite to petitioner's appendix attached to the instant petition as "Pet. App. at (page #)."

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD NOT BE GRANTED EITHER ON THE BASIS OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OR *LINDH v. MURPHY*.

Petitioner contends that this Court should grant certiorari to determine whether the Antiterrorism and Effective Death Penalty Act of 1996 ("Act") applies to pending petitions for writs of habeas corpus when the Act was signed. Pet. Br. at 11. Additionally, petitioner charges certiorari should be granted and considered together with *Lindh v. Murphy*, No. 96-6298, the decision upon which the Seventh Circuit relied in applying the Act in this case. Pet. Br. at 11. Alternatively, petitioner asserts that ruling on this petition for writ of certiorari should be held in abeyance pending this Court's ruling in *Lindh*. Pet. Br. at 11. This case does not present this Court with a question of general importance compelling the exercise of judicial resources to merit substantive review. Accordingly, this Court should deny the petition.

First, this Court should deny the petition because on April 14, 1997, this Court heard oral arguments in *Lindh*, directly addressing whether those provisions of the Act which lack an effective date apply retroactively to habeas petitions pending when the Act was signed. Since this Court's decision on this important question of federal law is pending, it is unnecessary to grant certiorari in the present case based on the same issue raised in *Lindh*.

Second, petitioner's charge that certiorari should be granted in the instant case so that the case may be considered in conjunction with *Lindh* is impractical. *Lindh*

has already been fully briefed and argued. Granting certiorari in this case would unduly delay this Court's ruling in *Lindh* because this case would have to be briefed and argued before a ruling on both cases could issue. This petition raises the same issue as *Lindh* regarding the Act's retroactivity. In the interest of judicial efficiency, it is more logical to rule on *Lindh* without the benefit of this case.

Alternatively petitioner asks this Court to delay ruling on the petition for certiorari in this case until a ruling in *Lindh* is announced. Pet. Br. at 11. Respondent does not object to this request.

II.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY FOUND THE TRIAL COURT DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT ALLOWED PETITIONER AND HIS COUNSEL TO CONFER DURING THE NOON RECESS.

Petitioner attacks the trial court's refusal to allow him to speak to his counsel in private during a two-hour noon recess. Pet. Br. at 14. He contends that this denial violated the constitutionally mandated rule in this Court's opinion in *Geders v. United States*, 425 U.S. 80 (1976). Respondent asserts that the trial court did not violate the *Geders* rule, and the petition for certiorari should be denied.

First, the instant case factually differs from *Geders*. In *Geders*, the trial court sequestered the defendant for a 17-hour overnight recess, prohibiting petitioner from

speaking to his counsel. *Geders*, 425 U.S. at 88. This Court held that "an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Geders*, 425 U.S. at 91. In the instant case, the Seventh Circuit recognized that no order existed prohibiting petitioner from consulting with his counsel. Pet. App. at 8. Rather, the facts established only that the trial court denied petitioner's request to be provided with a private location to confer with his counsel during the recess. Pet. App. at 8. Additionally, unlike *Geders*, petitioner was not between his direct and cross-examination when the recess was called. Pet. App. at 5. Rather, the State was still presenting its case before the recess. Pet. App. at 5.

Petitioner concedes that his counsel wanted to discuss petitioner's intended testimony. Pet. Br. at 15. This Court has held that "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Perry v. Leeke*, 488 U.S. 272, 280 (1989). Petitioner fails to make allegations that he wanted to discuss anything other than his testimony during the lunch recess. Pet. Br. at 15. Therefore, his right to effective assistance of counsel was not violated when he was not given a private area in which to speak to his counsel during the recess.

The Seventh Circuit properly noted that the right to effective assistance of counsel "was not an absolute right to consult in a private place with one's attorney during every trial recess." Pet. App. at 10. Respondent asserts

that this observation is correct. For if every defendant could demand private accommodations to talk to counsel during every recess, conceivably the trial courts would be unduly burdened with striving to safely relocate defendants to private locales during recesses. Surely, such measures are unnecessary to receive effective assistance of counsel.

In the instant case, petitioner failed to show that he was denied effective assistance of counsel. Pet. App. at 11. Petitioner's counsel only objected to being denied a private room within which to talk to petitioner. Pet. App. at 11. He failed to explain why the accommodations provided by the court prohibited meaningful consultation. Pet. App. at 11. He further failed to request a continuance to prepare petitioner. Pet. App. at 11. Petitioner's claim that he was denied effective assistance of counsel is without merit. The claim does not warrant granting certiorari.

CONCLUSION

For all of the reasons stated, respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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